T G Saujana Sdn Bhd v Ting Ai Choon @ Ting Ai Choong

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KCH-24NCvC–21/8 OF 2014
ALWI ABDUL WAHAB JC
26 JUNE 2015

Contract — Agreement — Tenancy agreement — Claim for specific performance under tenancy agreement — Clause in agreement on option to purchase — Allegation that property sold to another without consulting plaintiff — Whether plaintiff denied of right of first refusal — Whether plaintiff entitled to right of first refusal — Whether defendant in breach of clause in tenancy agreement when property sold to another — Whether plaintiff could claim for specific performance to compel defendant to repurchase property and be compelled to sell the same to plaintiff — Specific Relief Act 1950 ss 4(b), 7, 8(2) & 11

This was the plaintiff's claim for specific performance under ss 4(b), 7, 8 (2) and 11 of the Specific Relief Act 1950 to compel the defendant to perform the term under the tenancy agreement, in particular cl 6(b), being the option to purchase, which the plaintiff alleged that the defendant failed to allow the plaintiff to exercise. The plaintiff had entered into a tenancy agreement with one Mr Luk ('the first tenancy agreement'). This tenancy agreement was extended for three more terms ie from 2001-2004 ('the second tenancy agreement'), from 2005 – 2009 ('the third tenancy agreement') and from 2010 – 2014 ('the fourth tenancy agreement'). The fourth tenancy agreement was only executed on the 6 January 2001. The dispute arose during the period of the fourth tenancy agreement after the said property was sold to Rainbow Majestic Sdn Bhd ('Rainbow Majestic') for RM780,000. The plaintiff claimed that the defendant had sold the said property to Rainbow Majestic without consulting the plaintiff prior to the sale. As such, the plaintiff alleged that they had been denied a 'right of first refusal' in breach of para 6(b) of the fourth tenancy agreement. Although para 6(b) referred to the right of the plaintiff to purchase the said property as 'right of first refusal', the plaintiff used the terms 'option to purchase' instead. The plaintiff contended that both terms bear similar meaning and consequences and used them interchangeably. The issues that arose were whether the plaintiff was entitled to right of first refusal pursuant to para 6(b); whether the defendant was in breach of para 6(b) when the defendant sold the said property to Rainbow Majestic; whether the plaintiff could claim for specific performance to compel the defendant to repurchase the said property from Rainbow Majestic and be compelled to sell the same to the plaintiff.

Held, dismissing the claim with costs of RM8,000:

(1) The plaintiff was entitled to the right of first refusal when the plaintiff was first offered to purchase the said property at the price of RM580,000 which the plaintiff had counter offered RM500,000 before it was finally sold off to Rainbow Majestic at the price of RM780,000. A right of first refusal was not an agreement to agree. It did not purport to impose a future or a contingent contract on the parties. It only imposed an obligation or a duty on the vendor to make an offer to the purchaser for sale should the vendor wish to sell. The right of the purchaser to be offered first was a contractual right simpliciter. A right of first refusal was a privilege given to the purchaser to be first offered to purchase the property at a predetermined price should the vendor was desirous to sell it (see para 7).

(2) The plaintiff had already exercised their right under para 6(b) by making a counter offer which was not acceptable to the defendant. It was ludicrous for the plaintiff to expect another offer of a right of first refusal from the defendant at the price of RM780,000 when the plaintiff did not even consider a very much lower offer of RM580,000 with a counter offer of RM500,000. When the said property was finally sold to Rainbow Majestic at RM780,000, there was no necessity for the defendant to re-offer as this sale to Rainbow Majestic for the stated price was a direct consequence of the plaintiff's counter offer which was not agreeable by the defendant. The defendant had already discharged her obligation by giving the plaintiff a right to be first offered to buy the said property at a predetermined price fixed by the defendant (see paras 12–14).

(3) The plaintiff was only entitled to a right of first refusal once and they had exercised that right when they admitted to have made the counter offer of RM500,000. As the plaintiff counter offer was not agreeable being too low, that was the end of the matter. The defendant was therefore free to sell the said property to any potential buyer. There was no further obligation by the defendant to make another offer on the heels of the rejection by the plaintiff's counter offer. The defendant was not therefore in breach of cl 6(b) of the fourth tenancy agreement when she sold the said property to Rainbow Majestic (see para 15).

(4) The plaintiff must fail in its claim for specific performance. Neither that the plaintiff would be entitled for order of damages if Rainbow Majestic refused to sell the said property to defendant to enable the defendant to re-sell the said property to the plaintiff. In any event, it was impossible for the court to force the current owner, Rainbow Majestic, to sell the said property against its will and Rainbow Majestic was not even a party in this originating summons (see para 19).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif untuk perlaksanaan spesifik di bawah ss 4(b), 7, 8 (2) dan 11 Akta Relief Spesifik 1950 untuk memaksa defendan melaksanakan terma di bawah perjanjian sewa, terutamanya klausa 6(b), sebagai opsyen untuk membeli, yang mana plaintif mendakwa bahawa defendan gagal untuk membenarkan plaintif melaksanakannya. Plaintif telah memasuki perjanjian penyewaan dengan seorang yang bernama En Luk ('perjanjian penyewaan pertama'). Perjanjian penyewaan ini dilanjutnya untuk tiga penggal lagi iaitu dari 2001 – 2004 ('perjanjian penyewaan kedua'), dari 2005 – 2009 ('perjanjian penyewaan ketiga') dan dari 2010 – 2014 ('perjanjian penyewaan keempat'). Perjanjian penyewaan keempat hanya dilaksanakan pada 6 Januari 2001. Pertikaian berbangkit semasa tempoh perjanjian penyewaan keempat selepas hartanah tersebut dijual kepada Rainbow Majestic Sdn Bhd ('Rainbow Majestic') untuk jumlah sebanyak RM780,000. Plaintif mendakwa bahawa defendan telah menjual hartanah tersebut kepada Rainbow Majestic tanpa berunding dengan plaintif sebelum jualan tersebut. Dengan itu, plaintif mendakwa bahawa mereka telah dinafikan '*right of first refusal*' dalam kemungkiran perenggan 6(b) perjanjian penyewaan keempat. Walaupun perenggan 6(b) merujuk kepada hak plaintif untuk membeli hartanah tersebut sebagai '*right of first refusal*', plaintif sebaliknya menggunakan terma-terma '*option to purchase*'. Plaintif berhujah bahawa kedua-dua terma mengandungi maksud dan akibat yang sama dan menggunakan ianya silih berganti. Isu-isu yang berbangkit adalah sama ada plaintif berhak kepada penolakan pertama berikutan perenggan 6(b); sama ada defendan memungkiri perenggan 6(b) apabila defendan menjual hartanah tersebut kepada Rainbow Majestic; sama ada plaintif boleh menuntut pelaksanaan spesifik untuk memaksa defendan membeli hartanah tersebut daripada Rainbow Majestic dan memaksa menjualnya kepada plaintif.

Diputuskan, menolak tuntutan dengan kos sebanyak RM8,000:

(1) Plaintif berhak kepada hak untuk penolakan pertama apabila plaintif pertama kalinya ditawar untuk membeli hartanah tersebut pada harga RM580,000 yang mana ditawar balas oleh plaintif kepada RM500,000 sebelum akhirnya ia dijual kepada Rainbow Majestic pada harga RM780,000. Hak kepada penolakan pertama bukan perjanjian untuk bersetuju. Ia tidak bermaksud mengenakan kontrak kontijen atau masa hadapan ke atas pihak-pihak. Ia hanya mengenakan tanggungjawab atau duti ke atas penjual untuk membuat tawaran kepada pembeli bagi jualan sekiranya penjual berkeinginan untuk menjual. Hak pembeli untuk pertama sekali ditawarkan adalah hak *simpliciter* kontrak. Hak kepada penolakan pertama adalah keistimewaan yang diberikan kepada pembeli untuk pertama sekali ditawarkan untuk membeli hartanah pada harga yang ditentukan terlebih dahulu sekiranya penjual ingin menjualnya (lihat perenggan 7).

(2) Plaintif telah melaksanakan hak mereka di bawah perenggan 6(b) dengan membuat tawaran balas yang mana tidak boleh diterima oleh defendan. Ia adalah tidak munasabah untuk plaintif menjangka tawaran lain hak penolakan pertama daripada defendan pada harga RM780,000 apabila plaintif langsung tidak mempertimbangkan tawaran lebih rendah sebanyak RM580,000 dengan tawaran balas sebanyak RM500,000. Apabila hartanah tersebut akhirnya dijual kepada Rainbow Majestic sebanyak RM780,000, tidak perlu untuk defendan menawar semula kerana harga yang ditetapkan tersebut adalah akibat langsung daripada tawaran balas plaintif yang mana tidak dipersetujui oleh defendan. Defendan telah melepaskan tanggungjawabnya dengan memberikan hak kepada plaintif untuk pertama sekali ditawarkan untuk membeli hartanah tersebut pada harga ditentukan terlebih dahulu yang ditetapkan oleh defendan (lihat perenggan 12–14).

(3) Plaintif hanya berhak kepada hak untuk penolakan pertama sebaik saja mereka telah melaksanakan hak tersebut apabila mereka mengaku telah membuat tawaran balas sebanyak RM500,000 tersebut. Memandangkan tawaran balas plaintif tidak dipersetujui kerana terlalu rendah, ini berakhirnya perkara tersebut. Defendan oleh itu bebas untuk menjual hartanah kepada mana-mana pembeli yang berpotensi. Tidak terdapat tanggungjawab selanjutnya oleh defendan untuk membuat tawaran lain sebaik sahaja penolakan tawaran balas oleh plaintif. Defendan oleh itu tidak memungkiri klausa 6(b) perjanjian penyewaan keempat tersebut apabila dia menjual haratnah tersebut kepada Rainbow Majestic (lihat perenggan 15).

(4) Plaintif mesti gagal dalam tuntutannya untuk pelaksanaan spesifik. Plaintif juga tidak akan berhak kepada perintah ganti rugi jika Rainbow Majestic enggan menjual hartanah tersebut kepada defendan untuk membolehkan defendan menjual semula hartanah tersebut kepada plaintif. Walau bagaimanapun, adalah tidak mungkin untuk mahkamah memaksa pemilik sekarang, Rainbow Majestic, untuk menjual hartanah tersebut bertentangan dengan kehendaknya dan Rainbow Majestic bukan pihak dalam saman pemula ini (lihat perenggan 19).]]

Notes

For cases on tenancy agreement see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3340–3341.

Cases referred to

Affin Bank Bhd v Mohd Kasim Ibrahim [2013] 1 CLJ 465, FC (refd)
Hyde v Wrench (1840) 49 ER 132 (refd)
Malaya Ceramic Industries Sdn Bhd v Computer Systems Advisers (M) Sdn Bhd [1997] MLJU 213, HC (refd)

Tan Seok Leng v Magasu Sundram a/l T Magasu & Victor Glamour Sdn Bhd [2014] 1 LNS 355, CA (refd)

Legislation referred to

Contracts Act 1950 s 7
Specific Relief Act 1950 ss 7, 8(2), 11, 51

Parameswary (Arthur Lee Lin & Co Advocates) for the plaintiff.
Albert Tang (Jong Yee Ling with him) (Albert Tang Advocates) for the defendant.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] This is the plaintiff's originating summons for specific performance under ss 4(b), 7, 8(2) and 11 of the Specific Relief Act (1950) to compel the defendant to perform the term under the tenancy agreement dated 6 January 2011, in particular cl 6(b), being the option to purchase, which the plaintiff alleges that the defendant failed to allow the plaintiff to exercise. In the alternative, the plaintiff prays for damages as a result of their loss due to the defendant failure to observe the said cl 6(b).

[2] The plaintiff is a tenant of a shop house at the premises described as Lot 1, Section 51, Kuching Town Land District ('the said property'). The defendant is the wife and legal representative of Luk Tai Lik ('Mr Luk') appointed pursuant to two order of court granted by Sibu High Court in OS No 24–335 of 2006-II and OS No 24–38 of 2007.

THE FACTS OF THE CASE

[3] The plaintiff had entered into a tenancy agreement with Mr Luk from 1998–2001 (first tenancy agreement). This tenancy agreement was extended for three more terms ie from 2001–2004 (second tenancy agreement), from 2005–2009 (third tenancy agreement) and from 2010–2014 (fourth tenancy agreement). This fourth tenancy agreement was only executed on the 6 January 2001. The dispute arose during the period of the fourth tenancy agreement after the said property was sold to Rainbow Majestic Sdn Bhd ('Rainbow Majestic') for RM780,000 and the transfer of ownership was completed sometime in April 2012. The plaintiff claimed that the defendant had sold the said property to Rainbow Majestic without consulting the plaintiff prior to the sale. As such, the plaintiff alleged that they had been denied a 'right of first refusal' in breach of para 6(b) of the fourth tenancy agreement.

[4] Para 6(b) reads as follows:

That if the Tenant(s) shall be desirous of taking a new tenancy of the demised premises after the expiration of the five (5) years term hereby granted and of such their desire shall give the Landlord notice in writing less than three (3) months before the expiration of the said term and if the Landlord shall then be desirous of granting a new tenancy, the Landlord shall at or before the expiration of the term hereby created grant to the Tenant(s) a new tenancy of the demised premises commencing from and after the expiration of the term hereby granted for a further term of five (5) years subject to such rent stipulations terms and conditions as may be agreed between the Landlord and the Tenant(s), *unless the Landlord is desirous of selling the said premises, in which case he shall offer to the Tenant(s) the right of first refusal to purchase the same at the prevailing market rate exercisable within ninety (90) days of an offer ...*

THE ISSUES

[5] Although the above said para 6(b) refers to the right of the plaintiff to purchase the said property as 'right of first refusal', the plaintiff used the terms 'option to purchase' instead. The plaintiff contends that both terms bear similar meaning and consequences and used them interchangeably in the present case. Be that as it may, for the purpose of my determination, the issues are framed in the following manner:

(a) whether the plaintiff is entitled to right of first refusal pursuant to para 6(b)?

(b) whether the defendant was in breach of para 6(b) when defendant sold the said property to Rainbow Majestic?

(c) whether the plaintiff can claim for specific performance to compel the defendant to repurchase the said property from Rainbow Majestic and be compelled to sell the same to the plaintiff?

Whether the plaintiff is entitled to right of first refusal pursuant to Para 6(b)?

[6] The defendant's intention to sell the said property was communicated by one Mr Chai Jin Fatt ('Mr Chai') who was acting as agent of the defendant to Carolyne Lee, the plaintiff. Mr Chai offered the price of RM580,000. It was made verbally. Carolyne Lee told Mr Chai that she would have to consult the management of the plaintiff's company. Later she told Mr Chai that the plaintiff was making a counter offer of RM500,000. Mr Chai conveyed the counter offer to the defendant which was refused. The said property was finally sold to Rainbow Majestic.

[7] As the facts of this case revealed, the plaintiff was entitled to the right of first refusal, when the plaintiff was first offered to purchase the said property at the price of RM580,000 which the plaintiff had counter offered RM500,000

before it was finally sold off to Rainbow Majestic at the price ofRM780,000. In *Malaya Ceramic Industries Sdn Bhd v Computer Systems Advisers (M) Sdn Bhd* [1997] MLJU 213, the High Court held that 'a right of first refusal is not an agreement to agree. It does not purport to impose a future or a contingent contract on the parties. It only imposes an obligation or a duty on the vendor to make an offer to the purchaser for sale should the vendor wish to sell'. The right of the purchaser to be offered first is a contractual right simpliciter (*Tan Seok Leng v Magasu Sundram a/l T Magasu & Victor Glamour Sdn Bhd* [2014] 1 LNS 355). Simply put, 'a right of first refusal' is a privilege given to the purchaser to be first offered to purchase the property at a predetermined price should the vendor is desirous to sell it.

[8] It was not disputed that there was an offer and counter offer between parties but there was a dispute on whether the defendant's offer was made in October 2011 as claimed by the defendant, or in 2008/2009 as claimed by the plaintiff. Given this contradicting versions, it is pertinent for this court to look at the contemporaneous correspondences exhibited in the respective affidavits to weigh which version is more probable.

[9] The previous advocates acting for the defendant, Messrs Stephen Robert & Wong wrote a letter dated 24 October 12 to Messrs Arthur Lee, Lin & Co ('TG5') stating that they had offered the plaintiff to purchase the said property in October 2011 and the plaintiff has made a counter offer of RM500,000 which is below the market price. It was further stated in the letter that due to low counter offer, the defendant had no choice but to sell the said property to Rainbow Majestic at a higher price.

[10] In reply, Messrs Arthur Lee, Lin & Co wrote to Messrs Stephen Robert & Wong vide a letter dated 31 October 2012 (in bundle marked 'C2') stating that they were making a counter offer of RM500,000 based on a valuation prepared by CH Williams Talhar & Wong Sdn Bhd but was never given a reply whether it was acceptable or whether the original proposal of RM580,000 with a declared consideration of RM400,000 stood or not.

[11] It must be noted that in Messrs Arthur Lee, Lin & Co Advocates letter dated 31 October 12, there was no denial or dispute that defendant had made an offer of RM580,000 and that the offer was made in October 2011. Based on these contemporaneous documents, in all probability the defendant's version has greater weight than the plaintiff's version that the offer of RM580,000 was possibly made in October 2011.

Whether the defendant was in breach of para 6(b) when defendant sold the said property to Rainbow Majestic?

[12] As the plaintiff was making a counter offer of RM500,000 the defendant sold the said property to Rainbow Majestic. Now, the next issue is whether the defendant was in breach of para 6(b) of the fourth tenancy agreement when she sold the said property to Rainbow Majestic. Based on the finding of fact above, the plaintiff had already exercised their right under para 6(b), by making a counter offer which was not acceptable to the defendant. The defendant then managed to look for prospective purchaser who could pay the price as offered or even at a higher price.

[13] When the defendant sold the said property to Rainbow Majestic at a higher price of RM780,000, the plaintiff submitted that they were not given the offer of the right of first refusal prior to the sale pursuant to cl 6(b). In other words, the defendant should make another offer to the plaintiff of their right of first refusal at the price of RM780,000 before the said property can be sold to Rainbow Majestic.

[14] In this connection, I couldn't agree more with the counsel for the defendant's submission that it was ludicrous for the plaintiff to expect another offer of a right of first refusal from the defendant at the price of RM780,000 when the plaintiff did not even consider a very much lower offer of RM580,000 with a counter offer of RM500,000. When the said property was finally sold to Rainbow Majestic at RM780,000, there is no necessity for the defendant to re-offer as this sale to Rainbow Majestic for the stated price was a direct consequence of the plaintiff's counter offer which was not agreeable by the defendant. The defendant had already discharged her obligation by giving the plaintiff a right to be first offered to buy the said property at a predetermined price fixed by the defendant.

[15] The plaintiff is only entitled to a right of first refusal once and they had exercised that right when they admitted to have made the counter offer of RM500,000. As the plaintiff counter offer was not agreeable being too low, that is the end of the matter. The defendant was therefore free to sell the said property to any potential buyer. There is no further obligation by the defendant to make another offer on the heels of the rejection by the plaintiff's counter offer. The defendant was not therefore in breach of cl 6(b) of the fourth tenancy agreement when she sold the said property to Rainbow Majestic.

[16] In fact the counter offer by the plaintiff can be construed as a rejection. In *Hyde v Wrench* (1840) 49 ER 132, Lord Langdale had said the following as regards to counter offer:

> The defendant offered to sell it for £1000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contact; instead of that, the plaintiff made an offer of his own, to purchase the property for £950, and he thereby rejected the offer previously made by the

> defendant. I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties ...

[17] The same principle was applied in *Affin Bank Bhd v Mohd Kasim Ibrahim* [2013] 1 CLJ 465, where Abdul Hamid Embong FCJ, in delivering the majority judgment said:

> Section 7 of the Contracts Act 1950 requires an acceptance, to be valid, to be absolute and unqualified. The insistence by the respondent that his retirement age be 60 and not 55 as now offered is tantamount to a counter offer and a rejection of the original offer. This principle is endorsed by the Federal Court in *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd & Anor* [1998] 2 MLJ 350; [1998] 2 CLJ 486 where it was held that:
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> 'an acceptance is a final an unqualified expression of assent to the terms of the offer'. But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject.

[18] Learned counsel for the plaintiff raised an issue that an offer of a right of first refusal should be made in writing by the defendant to which I disagree as there is nothing of that sort stipulated under cl 6(b).

Whether the plaintiff can claim for specific performance to compel the defendant to repurchase the said property from Rainbow Majestic and be compelled to sell the same to the plaintiff?

[19] As a result of my finding on the second issue that the defendant was not in breach of para 6(b) of the fourth tenancy agreement, the plaintiff must fail in its claim for specific performance. Neither that the plaintiff would be entitled for order of damages if Rainbow Majestic refused to sell the said property to defendant to enable the defendant to re-sell the said property to the plaintiff. In any event, it is impossible for the court to force the current owner, Rainbow Majestic, to sell the said property against its will and Rainbow Majestic is not even a party in this originating summons.

CONCLUSION

[20] The plaintiff has failed to make out a case on a balance of probabilities, and this action is dismissed with costs of RM8,000.

Claim dismissed with costs of RM8,000.

Reported by Afiq Mohamad Noor